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Federal Reserved Water Rights since PLLRC

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WATER

FEDERAL RESERVED WATER RIGHTS SINCE PLLRC

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INTRODUCTION

Cyprinodon diabolis, The Devil's Hole pupfish, is alive and well and living in a striated marble palace in Nevada, located within a small addition to the Death Valley National Monument created for his benefit in 1952. "Zippy" is an insignificant little creature, about three-fourths of an inch long, who inhabits one of the remnants of the lake that once filled Death Valley. In Pleistocene times, the lake receded and left Zippy behind in a pool of water in the mouth of a limestone cavern. Other pupfish live in the few springs and tiny streams running in the valley, but in the course of 20,000 years *diabolis* has come to differ from his cousins many times removed, much as the finches Darwin found on the Galapagos Islands differ from their South American counterparts. The pool in Devil's Hole contains a submerged sloping rock shelf, which, for reasons best known to the pupfish, is the only place suitable for spawning and propagation of their race. In 1966 the Cappaerts, the owners of a nearby large ranch, drilled wells into the underground formation that supplies or supports the pool and began to pump water from it to irrigate bermuda grass, alfalfa, wheat, and barley. By 1970 the lowering water threatened to expose the rock shelf where the pupfish reproduce and thus to exterminate the last bearers of *Cyprinodon diabolis* genes.

Zippy has always had friends in high places. Dr. Robert Rush Miller, curator of fishes at the University of Michigan, and Dr. Carl L. Hubbs of the Scripps Institute of Oceanography were instigators of the movement to add the pupfish's home to the monument.[1] The National Park Service, the Department of the Interior, and former President Harry Truman were swayed by their efforts. In the now famous case of *Cappaert v. United States,*[2] the full weight of the federal judiciary was thrown in on the side of the insignificant pupfish. The United States Attorney,

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[1] Trusso, *Big Trouble for a Tiny Fish,* 3 SMITHSONIAN 48 (1972).

[2] 426 U.S. 128 (1976).

the Chief Judge of the United States District Court of Nevada, the Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States all rallied to the rescue, and the Cappaerts, the Nevada State Engineer, and the Attorney General of the State of Nevada were routed. The pumping was enjoined; the pupfish were saved.

The pupfish had not only a reservation of the land surrounding Devil's Hole but also a federal reserved water right for the pool within the Hole. The federal reserved water right is alive and well too. It is very like the Devil's Hole pupfish in many ways. It too is an evolutionary sport. It too lives in Devil's Hole. It too has friends in high places within the federal bureaucracy and judicial system.

The federal reserved water right is not like other water rights, at least not like those in the West. It is not on record, not fixed in size, not dependent on beneficial use. When the Federal Government withdraws a part of its land from the public domain and reserves it for a federal purpose, the Government by implication reserves enough of the "appurtenant"[3] unappropriated water to accomplish the purpose of the reservation. The water right may lie dormant for years, and in the meantime the water may have been put to use by people who have invested funds and effort to build water-dependent enterprises. Under the doctrine of prior appropriation their water rights would be safe from others who might seek to take the water, since the priorities of the latter would be later and inferior. But the rights are not safe from the United States. If the Government eventually exercises its reserved right, its priority relates not to the date of use but to that date, long past, when the reservation was created. When the government takes the water, therefore, the investment and the enterprise of the private water user go down the drain.

Or do they? This is the theory and the prediction. But in the twenty-one years since the federal reserved water right was invented, or discovered, by the Supreme Court, this has not yet happened. I am beginning to wonder if the comparison to the measly pupfish cannot be carried through—if the federal reserved

[3] No case defines or explains this word. It probably means "located" or "bordering on," possibly "underlying," possibly "nearby."

water right is also insignificant and worthless. At one time the federal reserved right was thought to be more like the great white shark of "Jaws." Reserved rights were seen "as a first mortgage of undetermined and indeterminable magnitude," as a "sword of Damocles" hanging over "every title to water rights to every stream which touches a federal reservation."[4] Inspired Senators and Congressmen rallied to the rescue. Over fifty bills were introduced to neutralize the rights—and nothing happened.[5] Nothing happened in Congress, and nothing happened to water users in the West.

I. ORIGIN OF THE DOCTRINE

Although it is now fashionable to say that the first precedents for the reserved doctrine were the dicta contained in the 1899 *United States v. Rio Grande Irrigation Co.*[6] case and the 1908 *Winters v. United States*[7] Indian case, can testify that no one regarded these as such prior to *Federal Power Commission v. Oregon*[8] *(Pelton Dam)* in 1955.

I was there. I took a course in water law in 1938 and got an A in it. I then went to work for L. Ward Bannister, one of the negotiators of the Colorado River Compact and lecturer in water law at Denver University and Harvard University. I helped to bring his notes up to date. I listened in on discourses he had with Ralph Carr, Jean Breitenstein, John Reed, and other "irrigation lawyers" of the old school. I started to teach water law in 1946, and I was General Counsel for the Missouri River Basin Survey Commission in 1952. At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law.

True, there was a notion lurking in the background that since the United States originally "owned" the water in the West, as

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[4] Address by Northcutt Ely to National Water Commission (Nov. 6, 1969).

[5] *See* Morreale, *Federal State Conflicts over Western Waters—a Decade of Attempted "Clarifying Legislation,"* 20 RUT. L. REV. 423 (1966).

[6] 174 U.S. 690 (1899). "[A] state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the government property." *Id.* at 703.

[7] 207 U.S. 564 (1908).

[8] 349 U.S. 435 (1955).

it owned the land of the public domain, it might still be the "owner" of unappropriated water.[9] This theory was advanced by Attorneys General for the United States in a couple of interstate cases, but it was seemingly rejected in *Kansas v. Colorado*[10] and was held inapplicable in *Nebraska v. Wyoming*.[11] In the latter case the waters of the North Platte were being divided between the states and the Government asked, on the strength of this theory, that a separate allocation of water be made to the United States for its irrigation projects. That argument the Supreme Court put aside, on the basis that under the Reclamation Act[12] the Government acquired its water rights through the state and the states therefore stood in judgment for the United States.[13] Earlier, in *California Oregon Power Co. v. Beaver Portland Cement Co.*,[14] a suit between private parties, the Supreme Court, on what now seems to be a spurious reading of the Desert Land Act,[15] held that the Act

> effected a severance of all water on the public domain, not theretofore appropriated, from the land itself. . . . Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories . . . .[16]

So the western water lawyer, though he may have had some nagging fear in the back of his mind that the United States might have constitutional power to use water without complying with state law, or even power to regulate its use, nevertheless felt quite safe behind the twin shields of the Reclamation Act[17] and the Desert Land Act.[18]

The safety thought provided by the Acts was weakened by

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[9] *See* Bannister, *The Question of Federal Disposition of State Waters in the Priority States*, 28 HARV. L. REV. 270 (1915); Carpenter, *Conflict of Jurisdiction Respecting Control of Waters in Western States*, 2 ROCKY MTN. L. REV. 162 (1929).

[10] 206 U.S. 46 (1907).

[11] 325 U.S. 589 (1945).

[12] 43 U.S.C. §§ 371-616yyy (1970).

[13] 325 U.S. at 629-30.

[14] 295 U.S. 142 (1935).

[15] 43 U.S.C. §§ 321-399 (1970). *See* F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW, NATIONAL WATER COMMISSION LEGAL STUDY NO. 5, at 147a-m (1971).

[16] 295 U.S. at 162.

[17] *See* note 15 *supra*.

[18] *See* note 12 *supra*.

the Supreme Court's *Pelton Dam* decision in 1955.[19] The *Pelton Dam* case did not involve water rights as such. All it held was that a license from the United States to build a dam on reserved lands could not be thwarted by lack of state permission.[20] But the language of both the majority and the dissent is susceptible of being construed as saying that the Desert Land Act's severance of the water from the public lands did not apply to reserved lands, which, therefore, still have water attached to them.[21] It is generally assumed that the power company is now exercising, by some implied assignment, the right of the United States to use the water which it reserved from the jurisdiction of the State of Oregon when it reserved the power site.[22] This was even worse than "ownership of unappropriated water;" it was ownership of *appropriated* water, if the appropriation had been made subsequent to the reservation.

This case was a real bombshell, and it certainly lit a fire under western water lawyers.[23] Senator Barrett of Wyoming rushed into Congress with the first of what was to be a long series of "Western Water Rights Settlement Acts,"[24] and a number of western state water officials and others raised a chorus of protest at this reversal of what they had always thought to be the law.[25] The fire was fueled by an even more direct holding that the United States need not comply with state water appropriation statutes.[26] A federal district court directly held that the commandant of the Hawthorne Naval Ammunition Depot need not file

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[19] *See also* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).

[20] 349 U.S. at 443-45. Stripped of dicta, the case does no more than assert federal supremacy, a slight modification of the rule of First Iowa Hydro-Elec. Power Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946).

[21] 349 U.S. at 447-48, 455-56.

[22] Carver, *The Implied Reservation Doctrine: Policy on Law*, 6 LAND & WATER L. REV. 117 (1970); Corker, *Let There Be No Nagging Doubts: Nor Shall Private Property, Including Water Rights, Be Taken for Public Use without Just Compensation*, 6 LAND & WATER L. REV. 109 (1970).

[23] Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604 (1957); Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626 (1957); Munro, *The Pelton Decision: A New Riparianism?* 36 ORE. L. REV. 221 (1957).

[24] S. 863, 84th Cong., 1st Sess. (1955).

[25] The most detailed treatment is Morreale, *Federal-State Conflicts over Western Waters—a Decade of "Clarifying Legislation,"* 20 RUT. L. REV. 423 (1966).

[26] Nevada v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

proofs of completion of wells used on that modern adaptation of an old military reservation. The Navy had originally filed for and received permits for the wells but, after *Pelton Dam,* refused to complete the state procedures. The court fanned the flames with the harshest statement yet of federal supremacy and rejection of state control: That the United States could not be compelled "to bend its knee to . . . state law and regulation"[27] that might impede its use of its own property for national defense purposes.

About this time the first stirrings of the environmental movement were felt, and the conservationists saw federal reserved rights as an escape from utilitarian state laws that emphasized the diversion and damming of streams. Even the Department of Justice and federal agencies began to look upon the mildest protection of private rights as possibly nullifying existing federal uses and frustrating federal programs and purposes.[28] So although many modified successors to the Barrett Bill[29] were introduced in the next ten to fifteen years, they lost rather than gained support as the opposition of these two groups coalesced. Meanwhile the misreading of the *Pelton Dam* case, or its misreading of the Desert Land Act,[30] came to fruition in *Arizona v. California.*[31] The chimera became a dragon: Reserved rights for non-Indian federal lands were declared to exist in real life; indeed, they were not only identified but quantified. The Havasu Lake National Wildlife Refuge was allowed a diversion of 41,839 acre-feet per year to feed its consumptive need for 37,339 acre-feet, and the Imperial National Wildlife Refuge was allowed to divert 28,000 acre-feet and consume 23,000 acre-feet, all with 1941 priorities.

II. THE PLLRC AND BEYOND

The following year the Public Land Law Review Commission[32] (PLLRC) was established to conduct a comprehensive review of the public lands of the United States and the laws, poli-

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[27] 165 F. Supp. at 601.

[28] F. TRELEASE, *supra* note 15, at 145.

[29] See note 24 *supra.*

[30] *See* C. WHEATLEY & C. CORKER, STUDY OF THE DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS (Prepared for the Public Land Law Review Commission) 106-12 (1969).

[31] 373 U.S. 546 (1963).

[32] The authorization for the PLLRC and the guidelines for its operation are found at 43 U.S.C. §§ 1391-1400 (1970).

cies, and practices relating thereto. The development, management, and use of water resources on the public lands was seen as a part of this assignment, and what has been known as the Wheatley-Corker Study[33] was commissioned. That study's thorough, in-depth analysis of the reserved rights doctrine and the reception and treatment given it by the agencies were supposed to be nonpartisan and dispassionate. Indeed it was, on the surface, yet it left not a shred of respectability to the doctrine. The Commission, however, put aside academic arguments and lingering doubts, saying they were laid to rest by *Arizona v. California,* and urged legislative action to dispel the uncertainties produced by the doctrine. The Commission recommended: First, a quantification by the agencies of their water requirements for the next 40 years; second, a procedure for administrative or judicial determination of the reasonableness and validity of the agency claims; third, a requirement that future withdrawals of land carry no water rights without an express reservation of unappropriated water; and last, but not least, a provision for compensation whenever a use under an implied reserved right interfered with a state law water right vested prior to the decision in *Arizona v. California.*[34] The Commission put its recommendation for compensation squarely on the basis of fairness by recognizing that "prior to the Supreme Court's decision . . . no water user could have been on actual or constructive notice of the existence of such an 'implied' Federal water right."[35]

The Commission's first two recommendations ignored the possibility explored in the Wheatley-Corker report: That federal implied reserved water rights might be identified and quantified by state courts and agencies in general adjudication proceedings along with everyone else's water rights. The federal agencies ignored the Commission's recommendation that they identify and quantify their own needs. When a Colorado water user summoned the United States into a Colorado state adjudication case, however, the Supreme Court ruled that the District Court in and for the County of Eagle acquired jurisdiction under the McCarran

[33] See note 30 *supra.*

[34] PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 141-49 (1970).

[35] *Id.* at 149.

Amendment,[36] by which the United States had consented to be sued in suits for the adjudication of water rights when it was the owner of water rights acquired by appropriation under state law, by purchase, by exchange, or otherwise.[37] This listing, said Mr. Justice Douglas, had no exceptions and included reserved rights. Questions of the validity and scope of reserved rights might be questions of federal law, but they were questions which might be decided by a state court, subject to review by the Supreme Court of the United States.[38]

By this time the National Water Commission[39] had been created, and the question of reserved water rights was made a part of a legal study relating to federal-state relations in water law.[40] I tried in that study to add an economic dimension to the discussion. I pointed out, to my complete satisfaction, that it was nonsense to treasure the doctrine as a source of power, as the Justice Department and the conservation groups were doing, since the United States had ample constitutional and statutory powers to take and use water for all its projects and programs, free from state interference. The only question, I tried to say, was whether the United States should pay for water it took from its former users. If it exercised federal power in the usual way, it would compensate the water user for his loss, but, if the new found "implied reservation doctrine" was used, the United States could take the water without paying for it. My first recommendation was for a National Water Resources Procedures Act, a procedural approach which would have combined the features of *Eagle County* and section 383 of the Reclamation Act[41] and applied them to all federal uses: The Federal Government should proceed in conformity with state law when making any use of water and follow state permit or court procedures when initiating or perfecting water rights. In other words, it should act as it had thousands of times in the past when obtaining water for national parks, forests, reclamation projects, and BLM lands. Conformity to state procedures did not mean compliance with substantive law,

[36] 43 U.S.C. § 666 (1970).
[37] United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971).
[38] *Id.* at 526.
[39] 42 U.S.C. § 1962 (Supp. IV 1974).
[40] F. TRELEASE, *supra* note 15.
[41] 483 U.S.C. §§ 371-616yyy (1970).

however. Federal supremacy was preserved and state law could not block a federal project or action authorized by a constitutional congressional statute. The national agency might proceed despite the state law, using such state forms and formalities as it deemed desirable to give the states notice of the type and amount of the federal claim.[42]

To this suggestion for procedural comity was added a recommendation for abolition of the no-compensation feature of the reserved right. The argument of the National Water Commission (NWC) was quite different from that of the Public Land Law Review Commission. The main theme of the NWC was that water law should be put on a sound property basis, that a sensible system of water rights would not include a bunch of wild cards in the deck, cards that could be played at any time as trumps to upset the expectations of water users. The doctrine should be abandoned, not simply on the fairness rationale argued by the PLLRC but because of its economic unsoundness, legal fallacies, and planning incompatibilities.[43]

The most that can be said for my efforts is that they dispelled the myth that reserved rights were a source of federal power and a valuable conservation tool that gave freedom from state control. The Department of Justice abandoned its claim to this effect and came to treat reserved rights simply as valuable property rights of the Government, valuable because they would save a few dollars of water costs for some federal water uses.

As a result of *Eagle County,* the federal agencies found themselves in state adjudication proceedings in New Mexico, Utah, and Idaho, as well as in several other Colorado courts. The Department of Justice felt that these valuable rights should not be left to unsympathetic state courts and administrators, but should be protected by the federal courts, and attempted an end run around *Eagle County.* The United States had been joined in the state proceedings in northwestern Colorado but not in southwestern Colorado. Federal lawyers rushed into the federal district court in Denver and filed a suit to adjudicate all federal reserved rights from the San Juan River and its tributaries for national

[42] NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 459-63 (1973).
[43] *Id.* at 464-68.

parks, monuments, and forests; rights held on behalf of a couple of Indian tribes; and some state law rights held for these purposes and for reclamation projects. Over a thousand water users were made defendants, the list being headed by Mary Akin, who enjoyed in some measure the advantage held by Abou ben Adam. The United States district judge first held that he had jurisdiction over the case, as one arising under federal law, but then dismissed it on the theory that he should abstain from deciding it since important problems of state law were involved. The Court of Appeals for the Tenth Circuit reversed, holding that abstention was inappropriate.[44]

While *Akin* was in this posture, the Secretary of the Interior, as Chairman of the United States Water Resources Council, asked the Department of Justice for its opinion on the National Water Commission's recommendations and for an alternative suggestion for a statute. What has come to be known as the Keichel Bill[45] was drafted, along with a supporting statement.[46] It would require the head of each water using agency of the United States to prepare an inventory of all the agency's water rights, both reserved and appropriated, under procedures established by the Secretary of the Interior and under statutory guidelines for quantification. The Secretary would maintain a national inventory of these rights and would inform the states of the water rights claimed in each. State water officials, or a water user claiming an injury, might then bring an action for judicial review in the federal courts. Curiously, this was not proposed as an exclusive remedy. State adjudications might still be brought under the McCarran Amendment, and the "race to the courthouse" might proceed.

The supporting statement, except for an erroneous assertion that the National Water Commission sought state control over federal activity by its "conformity" recommendation, explained the bill as a straightforward assertion of federal property rights. Quantification in this manner was said to be a fulfillment of the

[44] United States v. Akin, 504 F.2d 115 (10th Cir. 1974).

[45] U.S. Dep't of Justice, A Proposed Bill to Provide for the Inventorying and Quantification of the Reserved, Appropriative and Other Rights to the Use of Water by the United States (June 20, 1974 draft).

[46] *Id.* Supporting statement at 7-9.

PLLRC's request, and, as for compensation, it was said that this might follow the quantification once the United States knew how much people might be hurt and how much it might be giving away. This bill was never approved by the United States Water Resources Council or introduced into Congress. It now rests in the same limbo that holds the PLLRC and National Water Commission recommendations.

Next came the reversal of *Akin.* Mrs. Akin lost her alphabetical advantage because she didn't have funds to finance an appeal, and the case became the polysyllabic *Colorado River Water Conservation District v. United States.*[47] First the Supreme Court ruled that the United States district courts did indeed have jurisdiction over an adjudication brought by the Federal Government, that the McCarran Amendment gave concurrent but not exclusive jurisdiction to the state court.[48]

Turning to the question of abstention, the Court affirmed the court of appeals' holding that abstention was not proper, that there were no "difficult questions of state law," and that federal adjudications would not disrupt an important state policy. Then, astonishingly, the Court dismissed the case on another ground. After the federal action was begun, the United States had been served with process to make it a party in continuing adjudication proceedings going on in the Colorado Water Court for Water Division 7. It was already in court in Water Divisions 4, 5, and 6. The matter was one of concurrent jurisdiction, said the Court, and, to avoid duplication, to carry out the policy of the McCarran Amendment, and to prevent the piecemeal adjudication of water rights from the same source in different courts, the federal courts should give way.[50] The case was bolstered by considerations of forum non conviens (the federal court in Denver was 300 miles from the river), the fact that no action had yet been taken by the federal court, and the adequacy of the state court as a forum for the federal claims, as attested by the Government's participation in the other state adjudications.

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[47] 424 U.S. 800 (1976).
[48] *Id.* at 808-09.
[49] *Id.* at 813-17.
[50] *Id.* at 817-21.

This brings us finally back to the pupfish case, decided June 7, 1976. Although the *Eagle County* and *Colorado River District* cases had been occasions for restatement of the reserved rights doctrine, *Cappaert v. United States*[51] added some meager substantive clues to the doctrine. To some extent the Court reduced most of what it said to dicta. It pointed out that the proclamation setting aside the reservation proclaims that, "WHEREAS the said pool is of such outstanding scientific importance that it should be given special protection,"[52] and said that the water right reserved was therefore explicit, not implied.[53] However, the Court went on to give rules for implied reservations and to apply its statements to the reservation before it, as if it were an implied one.

I have been told that the Cappaerts, the Nevada water authorities, and their many states' rights friends fought the case to the death because it was the first case of substantial harm done by enforcement of a federal water right, and would, therefore, show the inequitable nature of such rights, and because they sought a ruling that groundwater hidden beneath the earth could not be the subject of a reserved right because its presence was unknown and there could have been no intention to preserve it. Both arguments were foredoomed.

The "inequitable" argument had always been based on the following assumed sequence: (1) A reservation was founded, say, in 1900; (2) in 1950, while the reserved water right lay dormant and unknown, an appropriator put the water to a valuable and beneficial use at a considerable cost; (3) the existence of the reserved right was discovered in 1955 or 1963 to the horror of all good water users and state governments; and (4) in 1970 the Government exercised its rights, and the appropriator was stripped of his water and shorn of his investment without any claim for compensation. But in the *Cappaert* case the sequence is reversed. The reservation was made in 1952, and the water was then used by the United States to maintain the lineage of its wards, the pupfish. It was the Cappaerts who in 1970 threatened

[51] 426 U.S. 128 (1976).
[52] *Id.* at 132.
[53] *Id.* at 140.

to disturb the status quo and interfere with the prior right and prior use of the United States.

The Court finally placed federal reserved rights on a property basis.[54] The Cappaerts and the State of Nevada paraded out the old, hackneyed argument that the Desert Land Act "severed the water from the land" and subjected it to state law. The Court took the bait and said that *Pelton Dam* was the answer, that the Desert Land Act does not apply to reserved land. "Federal water rights are not dependent upon state law or state procedures,"[56] said the Court, the Cappaerts' patents were " 'subject to any vested and accrued water rights,' "[57] including the Government's prior reserved rights. While their vested water rights were protected from later federal encroachment, the Cappaerts had no water rights in 1952.[58] The Court did not stress the fact that the Cappaerts' rights post-dated not only the federal reservation but also the federal use. This was the real answer, as the Cappaerts would have been entitled to no compensation even if the recommendations of the PLLRC and the National Water Commission had been law.

The groundwater argument fared no better. In one sense the Court ducked it. The reserved water, said the Court, was the pool in the cavern, and the pool was surface water. True, it was connected to groundwater, and the Court said: "We hold that the United States can protect its water from subsequent diversion, whether the diversion of surface or groundwater."[59]

The pupfish case shed some light on other troublesome issues. One is intent. In *Arizona v. California* the Court had said: "[T]he United States [who is he?] intended [how? with what?] to reserve water sufficient for the future requirements . . . ."[60] In *Cappaert* the Court repeated the standard formula:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether

[54] Prior to *Cappaert*, the Court had spoken of federal powers, not property rights. *See* F. TRELEASE, *supra* note 15, at 147j-l.

[56] 426 U.S. at 144.

[57] *Id.* at 145.

[58] *Id.* at 140 n.5.

[59] *Id.*

[60] *Id.* at 143.

> the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.[61]

But in its preliminary recital of the implied reservation of water rights doctrine, the Court found no need to speak of intent, whether implied, expressed, or fictional:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.[62]

Three other aspects of the case should be noted. First, a water level is maintained, giving some precedent for instream flows. Second, the Court reiterated the rule that

> [t]he implied reservation of water doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more . . . . The pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest . . . . Thus, as the District Court has correctly determined, the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved.[63]

This too has significance for those claims of the United States that stream flows may be reserved for instream uses. Such flows will be the minimum needed to preserve the features of the reservation, not full natural flows. Of course, there may be reservations whose purposes could demand a full natural flow, but there is some comfort in the recognition that others may share in the reserved waters, that the reserved right is not a complete dog-in-

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[60] 373 U.S. 546, 601 (1963).

[61] 426 U.S. at 139.

[62] *Id.* at 138. *Compare with* Personal Communication, February 17, 1977, from Michael D. White, Esq., of Denver, Colorado, sometime master-referee, "Seven Courts Case," *infra* note 66 (stating that "[t]he reservation doctrine is a device invented by the Court to remedy an oversight of the federal executive and legislative branches in failing to save or provide a method of saving water for federal purposes").

[63] 426 U.S. at 141.

the-manger doctrine.[64] Finally, the pool on the reservation was protected by reducing withdrawals from its off-reservation sources, again significant for instream flows. Such flows could be reserved not only in streams arising on the federal land but also in those flowing into the reservation or into and then out of a private enclave within a reservation.[65]

III. QUANTIFICATION—AT LAST

Following the remand of *Eagle County,* the United States filed its claims for reserved rights in that case and in several additional adjudication proceedings pending in other Colorado courts. These proceedings were consolidated into the "Seven Courts Case,"[66] and all federal claims were referred to a single master-referee. The litigation covered five river basins, and reserved water rights were claimed for seven national forests, one national park, three national monuments, fifteen hundred springs and waterholes, two mineral hot springs and two naval oil shale reserves. The report of the master-referee contains more than a thousand pages. It is three inches thick and weighs five and one-half pounds. It contains not only the typical findings of fact and conclusions of law but an excellent treatment of the law of reserved rights as well. Some of the conclusions reached seem more certain to the master-referee than to me; but he was ruling, not speculating or analyzing, and his positiveness is suited to his task.

It appears to me that this mountainous labor has brought forth a rather small mouse. In all of the northwestern third of the State of Colorado, the current uses by forests and parks add up to only 12.981 cubic feet per second of stream flow and 2044.2 acre-feet of stored water.[67] The water rights for these uses cause no problems; they coexist with existing private uses. The possible and probable future uses are those which supposedly cause the

[64] Furthermore, the Court equated Indian reservations with "other federal enclaves." *Id.* at 138. This may have significance when the Court comes around to deciding Indian claims to aboriginal ownership of streams.

[65] In several Indian cases, upstream diversions could be curtailed to permit Indian uses of waters flowing past the reservation. *See* Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

[66] M. White, Partial Master-Referee Report Governing All of the Claims of the United States of America In and For the State of Colorado (1976).

[67] *Id.* at 15.

concern over reserved rights. Conditional decrees for these future uses show that they may eventually total 35.963 cubic feet per second and 6352.39 acre-feet of impounded water. Out on the range land the reserved springs and waterholes are found to have a total flow of 15.39 cubic feet per second and impoundments of 7,223 acre-feet.[68] Not all of this is reserved. These amounts are subject to reduction when evidence is submitted to show the precise amount of water reasonably necessary to fulfill the needs of graziers who use the water-holes. These reserved waters are de minimis; they represent no water at all compared to the total flow of five rivers. It is true that these amounts do not include the minimum flows and levels for streams and lakes in the parks and forests. Evidence on these was postponed, and they will eventually be fixed at some future date prior to 1981. In the forests, however, these recreational, fish and wildlife reservations will have such a late priority as not to constitute a threat to current uses, if the master-referee's ruling on the Multiple-Use Sustained-Yield Act of 1960[69] holds up. In his opinion, the Creative Act of 1891[70] established the forest reserves for the purposes of watershed protection and production of timber. The Organic Act of 1897[71] expanded the description of these purposes but added nothing to them. The opinion reasoned that although the forests may have been used from the beginning for hunting, fishing, recreation, camping, and cattle range these were *uses,* not the *purposes* for which the forests were established. Not until the Multiple-Use Sustained-Yield Act of 1960 were "outdoor recreation" and "wildlife and fish" stated as statutory purposes for which the forests were maintained.[72] If this reasoning holds (and the master-referee presented a convincing case), then the priority date of instream flows for these purposes is June 12, 1960, long after most diversions and impoundments within the forests were made. Minimum flows will be superior to uses initiated after that date, and might interfere with some future uses high up in the headwaters, but this is not a total loss to private uses, since the reservations will preserve and pass down the flows for use below

[68] *Id.*
[69] 16 U.S.C. § 528 (1970).
[70] *Id.* § 471.
[71] *Id.* § 475.
[72] *See* note 69 *supra.*

the forest boundaries.[73] Although most western streams are formed on the national forests and run down from them, some streams run into them, and some leave them, flow through a private enclave, and then back into the forests. Post-1960 appropriations of these waters, on private lands before they enter or reenter forests, could be reduced by the forests' need for minimum flows.

But even these effects will not be felt if another ruling of the master-referee holds up. One section of the 1897 Organic Act is now 16 U.S.C. § 481: "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."[74] This, said the master-referee, subordinates all of the United States' reserved rights on national forests to Colorado water rights for domestic, mining, milling, or irrigation purposes, whether such rights bear priority dates before or after the date of the reservation of the waters appurtenant to the forests.

Another court has made a ruling quite inconsistent with these Colorado conclusions. An Idaho trial court, adjudicating a "minimum flow" for fishing, fire protection, and esthetic purposes on a forest established in 1907, gave the flow a 1907 priority date and quantified it as the full natural flow of the stream, in order to preserve the forest in its original condition.[75] If carried to extremes, this ruling would mean that all ditches in the national forests would have to be closed, all reservoirs emptied. I do not believe that this can be sustained. 16 U.S.C. § 481 may not be as far-reaching as the Colorado master-referee found it, but at least it indicates that private uses can be made within the forests. Furthermore, it seems very difficult to find an intent in 1891, 1897, or even 1960 to preserve the national forests in their pristine

[73] The continental divide runs north and south through Colorado, dividing not only the water of the state but the people of the state. The effect noted above may make the people of Denver very unhappy, since they may be unable to capture some water at elevations high enough to make transdivide diversions feasible, but this may be offset by a corresponding happiness of the people of the western slope.

[74] 16 U.S.C. § 481 (1970).

[75] Soderman v. Kackley, No. 1829 (Dist. Ct., Caribou County, Idaho, Jan. 8, 1975), *appeal docketed*, No. 12482 (Idaho Sup. Ct., Feb. 20, 1975).

condition as parks or wilderness areas. Not even the Devil's Hole pupfish is entitled to the maintenance of the natural conditions which existed at the time of the creation of his preserve in 1952. The Supreme Court in *Cappaert* explicitly stated:

> The pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest . . . . Thus, . . . the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved.[76]

Applying this rule to the national forests, it hardly seems possible that the Government could assert an intention to reserve full flows when its officers soon issued use permits for such ditches and dams and permitted uses to so impair the streams for forest purposes as to require a rollback of uses to restore as "necessary" that which has been foregone for many years.

Minimum flows for park purposes may be more likely, but they do not seem to create a very large problem in Colorado.[77] Rocky Mountain National Park is on the headwaters. But one substantial claim to instream flows in the Yampa River for Dinosaur National Monument could, if sustained, create problems for upstream energy companies which have conditional decrees for water for coal development.

The master-referee's report does not touch the largest possible federal reserved right, that for development of the Naval Oil Shale Reserve. A claim for 200,000 acre-feet—a tidy bit of water—was submitted. No evidence was submitted on this claim, however, and at a pretrial conference the claim was simply put aside, and the master-referee has now referred it back to the court. It, therefore, remains as a bug-a-boo. But gossip has it (a) that new research shows that this figure is much too high, and not nearly as much water will be needed for extraction of the oil as was first thought; (b) that since the Reserve nowhere touches the Colorado River, the water is not "appurtenant," and the claim to a reserved right may be withdrawn or denied; so that (c) if, or when, the United States undertakes to develop the oil shale as a national enterprise or leases of the oil shale are negotiated with

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[76] 426 U.S. at 141.

[77] *See* M. White, *supra* note 66 at 343, 374.

oil (energy) companies, the developer must appropriate or buy its water like any other lessee of oil shale on neighboring BLM lands. A few years ago the big threat was thought to be that Mineral King, a huge proposed Walt Disney Inc. ski resort on the Inyo National Forest in the Sierras, would claim the forest's recreational prerogatives. But the Forest Service has abstained from assigning its recreation right to concessionaires there and in New Mexico, and I know of no current threats of this nature. It is possible, of course, that other types of reservations may take substantial quantities of water. The federal reserved water rights quantified for the National Wildlife refuges in *Arizona v. California* sound big—annual diversions of 41,838 and 28,000 acre-feet producing consumption of 37,339 and 23,000 acre-feet. But these are drops in the lower Colorado bucket, at most three-fourths of one percent of withdrawals, although they admittedly might loom large elsewhere. Furthermore, a second look at the facts in the Report of the Special Master shows that these waters are needed for artificial marshes and irrigated feeding grounds to be substituted for natural areas destroyed by channelizing the river; and it is a fair guess that this water is no more than that which was formerly soaked up by, and evaporated from, the original natural river bottom areas.[78] At one time the Fish and Wildlife Service claimed the full flow of one of the Oregon streams feeding the Malheur Refuge and demanded that fifty-year-old irrigation ditches be closed, but that demand has been dropped.

CONCLUSION

I am coming to believe that "the Feds" were right all along. In 1964, at the height of the debates over the "Western Water Rights Settlements Acts,"[79] it was pointed out that "not a single case of harm has been reported,"[80] that "for all of the outcry . . . not one state, not one county, not one municipality, not one irrigation district, not one corporation, not one individual has come forward to plead and prove that the United States . . . has de-

[78] S. Rifkind, Special Master's Report, *Arizona v. California*, at 95 (1960).

[79] See note 24 *supra*.

[80] *Hearings on S. 1275 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 88th Cong. 2nd Sess. 39 (1964) (statement of Senator Clifford P. Anderson).

stroyed any private right."[81] Twenty-two years after *Pelton Dam* this is still true.

The actual measurement of National Forest uses in Colorado shows how small they are, and the quantification of future forest uses shows that most fears from this source are groundless. Federal officials have refrained from pressing large claims or assigning them to private enterprises carrying out federal functions. Minimum flows are located for the most part where they can do the least harm, and the courts are unlikely to order, and the federal agencies are likely to abstain from enforcing, large instream flows that would force a rollback of longstanding uses that have done no harm.

I find precious little common ground with Mr. Walter Kiechel and very few things that he and I agree upon. But he puts forth an idea in a sentence of the supporting statement to the Kiechel Bill that I think makes sense: "Surely until many more cases of actual interference are discovered than have been reported so far it is more appropriate that any meritous problems of this kind which may be found to exist be treated by special relief legislation."[82] Why not wait? A particularly atrocious case of uncompensated damage to waterfront property finally brought the downfall of the navigation servitude in section 111 of the Flood Control Act of 1970.[83] Why not wait for such a case of real and substantial harm from the implied reservation doctrine? Maybe Kiechel's special relief bill could be turned into general legislation. Such a case would be far more effective than the bogies we have been conjuring up.

So I no longer jump when the old tattered-sheet specter is thrust at me, and I am tired of leaping into action at every call of "Wolf!" In the future, I intend to devote my waning energies to real problems like why the Cappaerts and the United States do not act like ordinary water users with a protection of diversion problem, and work out a physical and legal solution that will allow irrigation, yet preserve the water level and, thus, permit the Cappaerts and the pupfish each to do their thing.

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[81] *Id.* (statement of Nicolas B. Katzenbach, Deputy Attorney General).

[82] *See* note 46 *supra.*

[83] F. TRELEASE, *supra* note 15, at 189-96.